

PALMER COKING COAL CO.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 84-604

Decided March 26, 1987

Appeal from a decision of Administrative Law Judge L. K. Luoma holding that two violations cited under a notice of violation had been abated. DV 2-1-R; NOV No. 82-1-2-2.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions

A permittee will be deemed to have abated a violation of 30 CFR 715.14(i) for failure to regrade and stabilize rills and gullies on the permit area deeper than 9 inches where the notice of violation was modified by agreement of the parties at a hearing to require stabilization by placing straw bales at strategic locations and the evidence establishes that the permittee has stabilized the rills and gullies.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions -- Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions

A permittee will be deemed to have abated a violation of 30 CFR 715.17(a) for failure to pass all drainage from the disturbed area through a sedimentation pond before leaving the permit area where the notice of violation was modified by agreement of the parties at a hearing to require construction of a sedimentation ditch using straw bales and the evidence establishes that the permittee constructed a berm and filter barrier which was the functional equivalent of the agreed-upon structure.

APPEARANCES: Susan K. Hoven, Esq., and Stuart A. Sanderson, Esq., Office of the Solicitor, Washington, D.C., and Glen F. Tiedt, Esq., Office of the Regional Solicitor, Denver, Colorado, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement; William J. Kombol, Manager, Palmer Coking Coal Company, for Palmer Coking Coal Company.

#### OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a decision of Administrative Law Judge L. K. Luoma, dated May 3, 1984, holding that the Palmer Coking Coal Company (Palmer) had abated two violations cited under notice of violation (NOV) No. 82-1-2-2, issued pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(3) (1982).

On August 31, 1982, after an inspection of Palmer's mine, an OSM inspector issued NOV No. 82-1-2-2, citing Palmer for "[f]ailure to pass all drainage from the disturbed area through a sedimentation pond prior to leaving the permit area," in violation of 30 CFR 715.17(a), and "[f]ailure to regrade [and] stabilize rills [and] gullies deeper than 9 [inches]," in violation of 30 CFR 715.14(i). The inspector required Palmer to pass all drainage from the disturbed area through a sedimentation pond and to regrade the eroded area to eliminate rills and gullies by November 1, 1982. On September 3, 1982, Palmer filed an application for review of and temporary relief from NOV No. 82-1-2-2, pursuant to section 525 of SMCRA, 30 U.S.C. § 1275 (1982).

On October 19, 1982, a hearing was held before Judge Luoma in Seattle, Washington. At the conclusion of the hearing, the parties entered into an agreement under which Palmer agreed to place straw bales at "strategic locations" to slow the run-off in the rills and gullies and to contain the movement of sediment, "thereby preventing further erosion," and to construct a sedimentation ditch, using straw bales, along the lower boundary of the disturbed area, in order to "capture all the run-off that flows in the improper direction." The parties also agreed that Palmer would have until May 1, 1983, "to demonstrate the effectiveness of [its actions]." The agreement was incorporated into a November 10, 1982, interim order of Judge Luoma, in which he stated: "I will leave the record open until such time as notified that abatement has been achieved. If not achieved by May 1, 1983, further action will be taken as deemed appropriate." Upon being advised that the parties had not reached an agreement on whether abatement had been achieved by May 1, 1983, Judge Luoma scheduled another hearing, which was held on July 1, 1983, in Seattle, Washington.

In his May 1984 decision, Judge Luoma concluded, based on the evidence presented at the July 1983 hearing, that Palmer had succeeded both in controlling erosion through the placement of straw bales in rills and gullies and in preventing the escape of silt-laden water from the permit area through the use of a "filter barrier." Judge Luoma held that Palmer had abated both violations under the terms of the agreement between the parties.

In its statement of reasons for appeal, OSM contends that Judge Luoma incorrectly determined that Palmer had abated the cited violations. OSM

argues that the evidence establishes that Palmer had failed to comply with the agreement between the parties to construct a sedimentation ditch, relying instead on a filter barrier which did not effectively prevent the escape of sediment from the permit area. OSM also argues that appellee failed to place sufficient straw bales in the rills and gullies to prevent further erosion and eliminate the existing rills and gullies.

After reviewing the evidence adduced at the hearing, in October 1982 and July 1983, we are in substantial agreement with the May 1984 decision of Judge Luoma. A few observations, however, are in order.

[1] The evidence introduced at the October 1982 hearing established that rills or gullies deeper than 9 inches had formed on the permit area and that they would continue to erode unless corrective actions were taken (Tr. 14, 42-3; OSM Exh. 12). The applicable regulation, 30 CFR 715.14(i), provides that: "When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established the permittee shall fill, grade, or otherwise stabilize the rills and gullies \* \* \*." (Emphasis added.) In an effort to stabilize the rills and gullies in the present case, the parties agreed at the October 1982 hearing that Palmer would place straw bales at strategic locations. Palmer did so, placing 24 bales at certain locations in October 1982 and an additional 32 bales at other locations in April 1983 at the suggestion of an OSM inspector, J. Thomas Harrell (Tr. 226, 228). David Agnor, the OSM inspector who had cited the violations, testified, based on inspections conducted on May 24 and June 29, 1983, that the placement of these bales had not eliminated the erosion, but, rather, that the rills and gullies were "deepening and widening" and new rills and gullies were forming, due to improper placement of the bales and the absence of sufficient bales (Tr. 139-40, 145, 148). Agnor argued that the bales were improperly placed to the extent that they did not bridge the rills or gullies but, instead, allowed water to flow around the bales (Tr. 143). Agnor admitted that in some cases sediment had been trapped by the bales (Tr. 148). In concluding that additional erosion had taken place since his August 1982 inspection, Agnor placed particular reliance on a Douglas fir seedling whose roots had been exposed by erosion which had taken place since that time (Tr. 146, 151).

In his May 1984 decision, Judge Luoma concluded that "run-off water is escaping down naturally-formed channels which have stabilized and erosion has been controlled" (Decision at 7). OSM argues that the presence of such channels by itself establishes that Palmer failed to comply with the regulations. We disagree. In reclaiming an area disturbed by mining, there is a period of time before revegetation stabilizes the newly replaced topsoil to the point that little or no erosion takes place. Cf. 30 CFR 715.20. During that time period, some erosion will inevitably occur, but it must be minimized. We conclude that that is the aim of 30 CFR 715.14(i). Indeed, the regulation provides that as an alternative to filling and grading, a permittee may "otherwise stabilize" rills or gullies. 30 CFR 715.14(i). That is, rills or gullies, which have already formed, may be left in place as long as they are "stabilize[d]." In the present case, there was general agreement that regrading, as originally contemplated in the NOV, would have been a futile solution where rills and gullies would merely reform prior to successful revegetation. (Tr. 204-05; Exh. A.)

OSM argues that the rills and gullies observed in August 1982 had not been stabilized by the placement of the straw bales because the bales trapped "very little" sediment and water was in some cases allowed to flow around the bales. OSM presumes that sediment was being carried down the rills and gullies and around the bales to a greater extent than was being trapped at the various places where it was observed. In sharp contrast, William Kombol, manager of Palmer, had observed "sediment-free" water flowing down the rills and gullies "during every heavy rain" in the 9 to 10 months prior to the July 1983 hearing (Tr. 246-48). We are inclined to lend greater credence to Kombol's reported observations, rather than OSM's assessments, on the flow of sediment down slope. While OSM argues that erosion was not being controlled, it introduced no measurements of the depth and width of the rills and gullies taken during the various inspections by Agnor to establish that the rills and gullies had not been stabilized after the placement of the straw bales. Agnor's conclusion that there had been additional erosion was based only on visual observations (Tr. 146). Even accepting that conclusion, OSM failed to establish that such erosion was still occurring after the placement of an additional 32 bales in April 1983. Scott Fisher, an OSM revegetation specialist, testified that the roots of the Douglas fir seedling, observed on June 29, 1983, had been exposed 6 weeks to 3 months prior to that time, given the condition of the seedling (Tr. 197-98). However, the timing is too close to conclude that the erosion which exposed the seedling roots took place after the final placement of the straw bales. From this evidence, we are unable to conclude that after the two efforts at placing straw bales, which the parties had agreed upon as the acceptable method of controlling erosion, Palmer had not succeeded in stabilizing the rills and gullies, in accordance with 30 CFR 715.14(i). Also, while the placement of straw bales did not eliminate the rills and gullies already well established, we do not find that such elimination was required by either the regulation or the agreement of the parties.

[2] The evidence introduced at the October 1982 hearing also established that a small portion of the runoff from the permit area was not going through a sedimentation pond (Tr. 49, 88). Agnor testified that the permittee needed an additional sedimentation control structure (Tr. 56). The applicable regulation, 30 CFR 715.17(a), provides that "[a]ll surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area." The regulation also provides that the regulatory authority may grant an exemption from this requirement "only when the disturbed drainage area within the total disturbed area is small and if the permittee shows that sedimentation ponds are [not] necessary to meet the effluent limitations \* \* \* and to maintain water quality in downstream receiving waters." *Id.* See Avanti Mining Co., 4 IBSMA 101, 89 I.D. 378 (1982). The requirements for constructing "sedimentation ponds" are set forth at 30 CFR 715.17(e). There are no comparable requirements for a sedimentation ditch. At the conclusion of the October 1982 hearing, the parties agreed that Palmer would construct a "sedimentation ditch," using straw bales, instead of a sedimentation pond.

Agnor testified at the July 1983 hearing that no ditch had been constructed with straw bales, but that Palmer had constructed a filter barrier, composed of tree branches and brush, at the base of the slope (Tr. 146-47).

Agnor also stated that OSM had specifically rejected a filter barrier in discussions at the July 1983 hearing (Tr. 224-25). Moreover, Agnor noted that some sediment was on the downslope side of the filter barrier, and concluded that "it is my opinion that it has occurred since the filter barrier has been installed" (Tr. 161, 164-65, 214-15).

Kombol testified that, in addition to the filter barrier, Palmer had constructed a sedimentation berm in October 1982, which was "about three to four feet of soil stacked up" (Tr. 227, 239). Agnor, however, testified that he had not observed the berm (Tr. 160). The photographic evidence introduced by Palmer indicates that a berm was constructed, or at least that the filter barrier was raised up by soil from the surrounding level of the forest cover (Tr. 231-32; Exhs. D, E, F). Kombol also stated that OSM Inspector Harrell had informed him after an April 1983 inspection in which he observed the filter barrier that "drainage from the disturbed area appears to be controlled" (Tr. 237). Kombol also noted that he had observed no sediment-laden water leaving the permit area during the 9 months prior to the July 1983 hearing (Tr. 272-73).

The obvious purpose of a sedimentation ditch or pond is to slow down the flow of water off a disturbed area so that the sediment may be deposited before the water runs off the permit area, with potential adverse effects to streams and aquatic and other natural resources. As noted above, we accept the fact that Palmer constructed a berm. This berm served as the functional equivalent of a ditch by creating an area upslope of the berm where water could collect. The only thing that Palmer did not do in compliance with the agreement between the parties was to use straw bales. <sup>1/</sup> Nevertheless, we conclude that the use of densely tangled branches and brush, along with the pile of soil, served the same purpose as a row of straw bales. No evidence was introduced that Palmer had not succeeded in meeting effluent limitations on suspended solids or that any downstream waters were being adversely affected. The only evidence that the measures undertaken by Palmer were not effective was the presence of six to eight hand shovelfuls of sediment downslope of the filter barrier (Tr. 164-65). However, Agnor had no evidence to substantiate his opinion that this sediment collected there after construction of the barrier. It is just as likely that it was deposited there when the berm was constructed, as Kombol suggested (Tr. 237-38). Based on all the evidence, we cannot conclude that Palmer did not effectively comply with the agreement between the parties by capturing all the run-off which flowed in an improper direction and with 30 CFR 715.17(a).

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<sup>1/</sup> We recognize that the decision by Kombol to use branches and brush instead of straw bales, as agreed upon, was unilateral. But, as counsel for OSM admitted at the July 1983 hearing, the overriding question is not whether the agreed-upon material was used but, rather, whether it was "effective" (Tr. 268-69). In that we have concluded that it was, there is no legitimate reason for requiring further action on appellee's part.

Accordingly, we conclude that Judge Luoma properly held that Palmer had abated the violations cited in NOV No. 82-1-2-2. 2/

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Anita Vogt  
Administrative Judge  
Alternate Member.

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2/ On July 23, 1984, Palmer filed a brief with the Board, enclosing several photographs indicating the "current status" of the contested areas. OSM filed a motion to strike this photographic evidence, on Aug. 1, 1984, contending that the evidence is not "relevant" to the current appeal. In light of our disposition of the appeal, the motion is denied.

